

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 33 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

PUSHPABEN BALWANTRAI

Versus

NANDKUMAR RAMANLAL

Appearance:

1. Civil Revision Application No. 33 of 1991
MS PP LAHERI with
MR SN SOPARKAR for Petitioner No. 1
MR KS JHAVERI for Respondent No. 1-2
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CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 11/02/2004

ORAL JUDGEMENT

1. The petitioner of the present Civil Revision Application is the original defendant of H.R.P. Suit No.2243 of 1982. The respondents herein are the original plaintiffs of the said suit. The plaintiffs filed the aforesaid suit for getting decree of possession of the suit premises which is situated in Jamalpur area of the city of Ahmedabad.

2. In the aforesaid sit the defendant had engaged the advocate to defend the suit. However, that advocate had subsequently retired from the suit proceedings. Ultimately the suit was decided ex-parte and decree for possession was passed in favour of the plaintiffs on 11-8-1989. Against the said ex-parte decree the petitioner had filed an appeal before the Appellate Bench of Small Cause Court, Ahmedabad. Since there was delay of about 7 months and 21 days, the petitioner had filed a separate application for condonation of delay along with the said appeal. As per the averments made in the said application for condonation of delay, the petitioner came to know about the said ex-parte decree on or about 28-4-1990. The petitioner was not informed about the ex-parte decree by her advocate. The Appellate Bench after hearing the concerned advocates ultimately passed the impugned order rejecting the application for condonation of delay on 28-9-1990. Thus, by the impugned order dated 28-9-1990 passed below the application exh. 1 in Civil Appeal No. 79 of 1990, the prayer for condonation of delay was rejected by the Appellate Bench. The said order dated 28-9-1990 passed by the Appellate Bench bellow the application exh. 1 in Civil Appeal No. 79 of 1990 is impugned in the present Civil Revision Application at the instance of the present petitioner.

3. It is required to be noted that the present Civil Revision Application was admitted by this Court about a decade back and interim relief was granted and is operating since admission of the present Civil Revision Application.

4. Ms. P.P. Laheri, learned advocate for the petitioner vehemently submitted that the Appellate Bench has taken into consideration irrelevant factors while deciding the application for condonation of delay and the Appellate Bench has failed to exercise its jurisdiction vested in it in a proper manner. It is submitted by the learned advocate for the petitioner that initially the original defendant had engaged one advocate to defend the suit. But he had retired from the suit proceedings and under the circumstances the suit went on undefended and

the Appellate Bench should have condoned the delay caused in filing the aforesaid appeal.

5. In paragraph no. 2 of the application for condonation of delay which was submitted by the petitioner before the Appellate Bench the averment is made that the advocate of the petitioner had assured the petitioner that as and when it is necessary the power of attorney holder of the petitioner would be informed about the date of the suit proceedings. Since no intimation was given by the advocate for the petitioner to the power of attorney holder of the petitioner and the petitioner never knew that her advocate has retired from the suit proceedings, the suit went on ex-parte.

6. Learned advocate for the petitioner further submitted that when the power of attorney holder of the petitioner went to see the advocate he was not given any reply and ultimately the power of attorney holder came to know about the ex-parte decree only on 24-8-1990. Under the circumstances, the delay caused in preferring the appeal was required to be condoned by the Appellate Bench.

7. On behalf of the respondents, it is contended that the deed of power of attorney was not produced before the Trial Court. It is also argued on behalf of the respondent that Execution Application No.11 of 1990 was filed for obtaining the possession of the suit premises and at that stage only the petitioner had moved the Appellate Bench by filing the application for condonation of delay.

8. It is required to be noted that during the proceedings of the present Civil Revision Application the petitioner has placed on record the deed of power of attorney by which the original defendant Pushpaben has given power of attorney to one Shirajbhai. The said power of attorney seems to have been executed on 13-3-1987 i.e. after filing of the suit.

9. The suit was filed in the year 1982 and in the said suit the ex-parte decree was passed by the trial Court on 11-8-1989. In view of the aforesaid factual aspects the learned advocate for the petitioner submitted that the said power of attorney was given during pendency of the aforesaid suit and unfortunately at the relevant time the concerned advocate of the defendant appearing in the suit proceedings had not informed the power of attorney holder of the petitioner. The original defendant was under the impression that henceforth her

power of attorney holder will be attending the suit proceedings. It is no doubt true and is rightly observed by the Appellate Bench that so far as the application for condonation of delay is concerned, no proper ground is made out for condonation of delay and the said application is drafted in a slipshod manner. It is also observed by the Appellate Bench that the trial Court had issued the notice to the defendant when the advocate of the defendant had retired from the suit proceedings and thereafter the advocate of the defendant had not appeared and not defended the suit. The Appellate Bench also found that the suit premises is a business premises and since the defendant being a lady she was not able to carry out the business and hence she had transferred the suit premises to Sirajbhai Alibhai in whose favour the power of attorney is executed. The Appellate Bench has also observed that the present appeal is filed by the sub-tenant and not by the original tenant. The Appellate Bench has further observed that the power of attorney holder is not related to the original defendant and that the appellant i.e. present petitioner has not explained any reason for delay caused in preferring the appeal. The Appellate Bench also found that the said the deed power of attorney was not produced before the trial Court. Considering the aforesaid grounds the application for condonation of delay was rejected by the Appellate Bench.

10. It is required to be noted that the deed of power of attorney was executed by the defendant when the suit was pending. The defendant had already engaged an advocate in the Trial Court to defend the suit. However, unfortunately the said advocate ultimately retired from the suit proceedings and the defendant was not aware about the said ex-parte decree, as according to the petitioner, she was under the impression that her power of attorney holder will look after the further proceedings of the suit. It is, however, true that since copy of the deed of power of attorney was not produced before the trial Court, the trial Court was not expected to serve notice to the power of attorney holder that the advocate who was engaged by the defendant has already retired from the suit proceedings. It seems that as a matter of fact notice of retirement of the advocate from the suit proceedings was sent to the defendant. However, it cannot be said that the defendant was not interested in defending the suit especially when she had already engaged the advocate to defend the suit. At the time of deciding the application for condonation of delay the Appellate Bench has taken into consideration irrelevant facts by considering relationship between the power of

attorney holder and the original defendant. The Appellate Bench has observed that the power of attorney holder is not related to the defendant. The Appellate Bench has also observed that the defendant seems to have sublet the suit premises to the power of attorney holder. The aforesaid observations of the Appellate Bench, in my view, are beyond the scope of deciding the application for condonation of delay. It is nobody's case that the deed of power of attorney executed by the defendant is fabricated or false. There is no law which suggests that the power of attorney can be given to such a person who is near relative of the executor of the document. Any person can give power of attorney to anyone of her or his choice. The observation of the Appellate Bench with regard to the fact that the power of attorney is not related to the original defendant, in my view, is absolutely irrelevant and such fact has no basis for deciding the application for condonation of delay. Similarly, the observation of the Appellate Bench regarding subletting of the suit premises is also beyond the scope of deciding the application for condonation of delay. The Appellate Bench has taken into consideration irrelevant facts while considering the application for condonation of delay. The Appellate Bench has, therefore, committed error by taking into consideration the irrelevant facts while deciding the application for condonation of delay.

11. While deciding the application for condonation of delay, the Court is required to take into consideration whether there is any sufficient ground for condoning delay. The Court is not required to take into consideration the merits of the case. Merits of the case cannot be decided unless the delay is condoned and the matter is taken up for hearing after condonation of delay. At such stage, the Court is not expected to take into consideration the merits of the main issues. The main issues cannot be decided unless delay is condoned by the Court and the matter is taken up for hearing on its own merits. The Appellate Bench has, therefore, committed the error in coming to a conclusion that the appellant i.e. the present petitioner has not explained delay.

12. It is to be noted that the question of subletting of the suit premises is not the subject matter of the suit itself. Therefore, on the aforesaid grounds, the impugned order of the Appellate Bench is required to be quashed and set aside. Even otherwise as pointed out earlier, the defendant has already engaged the advocate to defend her suit. But unfortunately the said advocate

had retired from the suit proceedings and there seems to some lack of communication because the advocate of the defendant had retired from the suit. It is argued by the learned advocate for the petitioner that the defendant was under the impression that her power of attorney holder will look after the suit proceedings and she had not followed up the matter further and perhaps because of retirement of the advocate of the defendant from the suit proceedings the deed of power of attorney was not produced on the record of the case. Considering the aforesaid facts, it cannot be said that the defendant was not interested in defending the suit.

13. As stated earlier in this judgment, the defendant has right to execute power of attorney in favour of any person of her choice and there is no provision of law under which such power of attorney is required to be given to only near relative. Such irrelevant factors are taken into consideration by the Appellate Bench at the time of deciding the application for condonation of delay. Therefore, in my view the impugned order of the Appellate Bench is required to be quashed and set aside.

14. Considering the aforesaid aspects of the matter as well as the fact that since a decade back this Civil Revision Application was admitted by this Court and the interim relief was granted against the execution of the decree, in my view, the application for condonation of delay submitted by the present petitioner before the Appellate Bench is required to be allowed and the matter is required to be sent back to the Appellate Bench for deciding the appeal on its own merits. Considering the fact that the appeal was preferred by the petitioner in the year 1990, the Appellate Bench is directed to decide the main appeal on its own merits latest by 31st August, 2004. The petitioner is also directed to deposit cost of Rs.1000/- before the trial Court in connection with condonation of delay. The petitioner shall deposit cost of Rs.1000/- before the trial Court within a period of four weeks from today. On such deposit of cost of Rs.1000/- by the petitioner, the respondents herein would be at liberty to withdraw the same unconditionally.

15. Under the circumstances, this Civil Revision Application is allowed and the impugned order dated

29-9-1990 passed by the Appellate Bench of Small Cause Court, Ahmedabad below the application exh. 1 in Civil Appeal No.79 of 1990 is quashed and set aside and the application for condonation of delay submitted by the petitioner before the Appellate Bench is allowed and delay caused in preferring the appeal is condoned. The Appellate Bench, Small Cause Court, Ahmedabad, is directed to proceed with the appeal and to decide the same in accordance with law within stipulated time i.e. 31st August, 2004. The Registry of the Appellate Bench, Small Cause Court, Ahmedabad is directed to give appropriate number to the said appeal. The Registry of this Court is also directed to send writ of this order to the Appellate Bench, Small Cause Court, Ahmedabad forthwith so that the appeal can be disposed of within aforesaid stipulated time. Rule is made absolute to the aforesaid extent, with costs as quantified above.

(P.B. Majmudar, J.)

/JVSatwara/